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Supreme Court, U.S.
FILED
NOV - 4 2005
OFFICE OF THE CLERK

No. 05-586

IN THE

Supreme Court of the United States

PLACER COUNTY; TRACY GRANT; RON GOODFASTER; BRIAN WIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFREY POTTER; PLACER COUNTY SHERIFF'S DEPARTMENT; REED, OFFICER,
Petitioners,

v.

MICHAEL BALDWIN DDS AND GEORGIA CHACKO,
Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER ALL TRUTHFUL ASSERTIONS WITHIN AN AFFIDAVIT WHEN CONSTRUING THE SUFFICIENCY OF PROBABLE CAUSE ASSERTED TO SUPPORT A SEARCH WARRANT.

2. WHETHER THE NINTH CIRCUIT GRANTED UNWARRANTED DEFERENCE TO THE WHITE-COLLAR NATURE OF THE PUBLICLY REPRESENTED OCCUPATION OF A SUSPECTED NARCOTICS TRAFFICKER IN FINDING A FOURTH AMENDMENT VIOLATION BASED ON THE FORCE BRIEFLY EMPLOYED TO DETAIN THE SUSPECT DURING THE EXECUTION OF A SEARCH WARRANT.

3. WHETHER POTTER'S CONDUCT DURING THE COURSE OF A SERACH OF A SUSPECTED DRUG TRAFFICKER'S HOME VIOLATED "CLEARLY ESTABLISHED" LAW WARRANTING THE DENIAL OF HIS RIGHT TO QUALIFIED IMMUNITY.

PARTIES TO THE PROCEEDINGS

Petitioner

Jeffrey Potter, Auburn, California,

Respondents

Georgia Chacko and Michael Baldwin, Carmichael, California.

The following parties named in the caption of the underlying action have not petitioned for review: Placer County, Placer County Sheriff's Department, Brian Whigam, Kevin Besana, Ron Goodpaster, Stephen L. D'Arcy and Tracy Grant.

Officer Reed has filed a separate petition for review.

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PETITION FOR WRIT OF CERTIORARI

David P. Mastagni and David E. Mastagni on behalf of Jeffrey Potter, petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the Ninth Circuit Court of Appeals is reported at 418 F.3d 966. App., *infra*, A. The

superseded opinion of the Ninth Circuit Court of Appeals is reported at 405 F.3d 778. App., *infra*, B. The opinions of the district court, No. 04-15848, D. C. No. CV-01-01177-MCE are unreported. App., *infra*, C.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2005. App., *infra,* B. This judgment was amended on August 8, 2005. App., *infra,* A. A petition for rehearing was denied on August 8, 2005 and the court of appeals stated it would not entertain any new petitions. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend. IV.

STATEMENT

1. On September 22, 1998, Placer County Sheriff's Deputy Jeffrey Potter, a member of the Placer County Marijuana Eradication Team (MET), obtained a search warrant for the Loomis, California home of Respondents, Michael Baldwin and Georgia Chacko ("Baldwins"). The following morning, members of the MET entered the residence of Respondents to execute the search warrant.

Deputy Potter entered the master bedroom after repeatedly nudging Chacko in her throat with his fingers to move her out of the doorway.[1] Chacko alleges Potter placed a gun to the back of her head immediately following his entry into the bedroom and before handcuffing her.[2] She suffered no physical injury.

The MET unit seized 147 marijuana plants from the house. Respondents brought excessive force and judicial deception claims following their arrest.

It is undisputed that on September 16, 1998, Deputy Potter found .08 grams of dried and partially burned marijuana leaves, marijuana stems, some planting pots, and a "lava rock" during the serach of Respondents' garbage outside their home. Deputy Potter relying on his experience and training believed the Baldwins were using these "lava rocks" as a growing medium for the cultivation of marijuana.

The Baldwins claim Deputy Potter lied in his affidavit in support of the search warrant, in asserting he found "fresh, green and still moist marijuana stems and leaves recently cut from a mature marijuana plant," a "grow rock," and "pots."

Deputy Potter also relied on and incorporated the statement of a confidential citizen informant to support his request for a search warrant. The informant personally knew Placer County Deputy Sheriff, Deputy Reed. The informant's sealed statement identified Baldwin by his name and other profession (a dentist), provided specific articulable facts demonstrating likely marijuana cultivation by Michael

[1] Petitioners Placer County, Tracy Grant, Ron Goodpaster, Brian Wiggam, Kevin Besana, Stephen L. D'arcy, Jeffrey Potter, Placer County Sheriff's Department, and Officer Reed accepted these allegations as true for purposes of appeal.

[2] Michael Baldwin brought an excessive force claim against Deputy Reed during the same search.

Baldwin, and included the basis for the informant's assertions.

2. Respondents filed their First Amended Complaint on October 12, 2001, alleging a 42 U.S.C. § 1983 claim based upon the alleged Fourth Amendment violations against Jeff Potter, Tracy Grant, Ron Goodpaster, Mark Reed and Kevin Besana. In addition the Baldwins alleged false arrest, assault, battery, defamation, RICO violations, excessive force/unreasonable seizure, judicial deception, conspiracy to commit judicial deception, a due process claim and a *Monell*[3] claim asserting that Placer County had a practice, policy and custom of similar Fourth Amendment violations. Due to the 42 U.S.C. § 1983 claims, the United States District Court was conferred jurisdiction over Respondents claim pursuant to 42 U.S.C. § 1343(3).

On May 20, 2003, Petitioners[4] moved for summary judgment as to all claims based on Respondents failure to respond to any written discovery. Respondents provided discovery responses before the hearing, and the motion was denied in part, but granted as to the defamation claim against Steven L. D'Arcy, the Undersheriff of Placer County.

After deposing Chacko and Baldwin, Petitioners, including Potter, filed a motion for summary judgment on December 7, 2003. The District Court heard the motion on January 26, 2004. Following that hearing, the District Court took the motion under submission until issuing its Order on April 2, 2004. App., *infra*, C.

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[3] *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658 (1978)

[4] Petitioners refers to Jeffrey Potter , Placer County, Tracy Grant, Ron Goodpaster, Brian Wiggam, Kevin Besana, Stephen L. D'Arcy, Placer County Sheriff's Department, and Officer Reed.

The District Court's April 2, 2004, Order, granting in part and denying in part Petitioners' motion for summary judgment, took note of Respondents' abandonment of their RICO, false arrest, and false imprisonment claims, in addition to their claims for equitable relief. App., *infra,* 21a. The Court granted summary judgment in favor of Petitioners as to Respondents' "defamation plus" claim under Section 1983 against D'Arcy; their due process claim against Brian Whigam, alleging perjured testimony at a preliminary hearing leading to their criminal prosecution; their excessive force and assault claims against all officers other than Reed and Potter; and Chacko's excessive force/unreasonable seizure claim against Potter for allegedly ogling her in her bedclothes. App., *infra,* 24a-26a.

The District Court denied summary judgment as to the Baldwins' excessive force claims arising from the allegations of excessive force relative to the momentarily placement of a gun to their heads prior to being handcuffed; Chacko's excessive force claim relative to being poked in her throat by Potter; the judicial deception claim; the conspiracy to commit judicial deception claim; and the *Monell* claim. App., *infra,* 22a-23a.

3. Petitioners, Jeff Potter, Mark Reed, Ron Goodpaster, Kevin Besana, Tracy Grant, the County of Placer and the Placer County Sheriff's Department filed an interlocutory appeal on April 28, 2004. For purposes of the appeal only, the Petitioners accepted Respondents' allegations as true to obtain a ruling before trial on the legal viability of the claims alleging excessive force and judicial deception in violation of Respondents' Fourth Amendment rights.

The first opinion of the Ninth Circuit Court was issued April 19, 2005. *Baldwin* v. *County of Placer*, 405 F.3d 778 (9th Cir. 2005), *opinion amended and superseded on denial of rehearing by* 418 F.3d 966 (9th Cir. 2005); App.,

infra, B. The panel held the Petitioners violated established Constitutional rights through use of excessive force and accordingly found that qualified immunity was appropriately denied. App., *infra,* 14a. The panel also held that absent the false information in the search warrant probable cause did not exist. App., *infra,* 14a-15a.

On May 3, 2005, Petitioners sought rehearing or rehearing en banc based on the court's failure to apply material points of law and fact and failure to follow relevant United States Supreme Court decisions. On August 8, 2005, the panel amended its opinion in light of the recent decision issued by this Court, but also affirmed its prior decision and denied the petition for rehearing. The panel declared it would not entertain any new petitions. *Baldwin* v. *County of Placer*, 418 F.3d 966 (9th Cir. 2005); App. *infra*, A.

4. In *Baldwin* v. *County of Placer*, *supra*, 418 F.3d 966, the court held (1) no exigency existed to justify the use of even minimal force when there was no pre-entry evidence suggesting the dentist-homeowner and his wife (Chacko) would resist, flee, or be armed; (2) after "Potter's lies" are redacted from the affidavit in support of the search warrant, the warrant was lacking in probable cause; and (3) Petitioner was not entitled to qualified immunity because the law at the time of the search "clearly established" that his conduct involving the search of the home violated Respondents' constitutional rights. *Id.* at 970-971; App., *infra,* 7a-9a.

With respect to the first issue of alleged excessive force, the panel provided no legal basis, in holding "a reasonable officer" would know that nudging Georgia Chacko in the throat to move her from a doorway was excessive. *Baldwin,* 418 F.3d at 970, citing *Brosseau* v. *Haugen,* 125 S. Ct. 596, 599 (2004); App., *infra,* 7a. The panel declared Deputy Potter should have been aware the Ninth Circuit has previously established the "right" of a